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DATUK BANDAR KUALA LUMPUR

v.

RIJAL SECURITIES SERVICES SDN BHD

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HIGH COURT MALAYA, KUALA LUMPUR
ASMABI MOHAMAD JC
[CIVIL ACTION NO: S4-21-177-2008]
21 NOVEMBER 2012

C ***CONTRACT:*** *Breach - Agreement to provide security services - Damages - Failure to provide security services resulting in loss of fittings - Termination of service - Liability for missing fittings - Consideration of - Whether termination of service lawful*

D *Vide* the Security Services Agreement ('the agreement'), the plaintiff appointed the defendant to provide security services at the plaintiff's site known as "Tapak Projek, Kompleks Pasar, Jalan Datuk Keramat, Kuala Lumpur" ("Pasar Keramat") for a period of three years with effect from 1 September 2006 to 31 August 2009. The plaintiff alleged that at the time of delivery of possession E of Pasar Keramat to the defendant, all the fittings attached to Pasar Keramat were still intact and in good order. However, the plaintiff's officers subsequently discovered that most fittings attached to the premises were missing and thus, a police report was lodged in relation to this matter. The plaintiff then sent a F notice to the defendant informing them of the damages to the premises and demanded the payment of RM3,474,304,05 from the defendant. Thereafter the plaintiff proceeded to terminate the agreement and appointed a new contractor to complete the works at Pasar Keramat. It was the plaintiff's contention that the G defendant had failed to provide the security services at Pasar Keramat which had resulted in the loss of all fittings worth RM5,251,008,50. The defendant denied the said allegation and submitted, *inter alia,* that Pasar Keramat was an abandoned project and had been so for more than five years where most of the H electrical cables were cut off and stolen. The defendant alleged that it had notified the plaintiff of the state of affairs of the premises *vide* a letter dated 7 September 2006. The defendant thus counter claimed and contended that the plaintiff had breached the agreement between the parties as the plaintiff had I

unlawfully and unreasonably terminated the defendant's services at Pasar Keramat. The defendant claimed damages for losses suffered by the defendant caused by the alleged wrongful termination of the agreement.

Held (dismissing plaintiff's claim and defendant's counterclaim with costs):

(1) There was no document produced by the plaintiff to show the actual condition at the site at the time of handing over and no proper inventory prepared by the plaintiff to show that Pasar Keramat which had been abandoned for more than five years was still intact and in good order. Further, the plaintiff was not able to provide proof if any company was engaged to provide security services to Pasar Keramat before the defendant was appointed under the agreement. (para 29)

(2) The fittings that were missing were bulky and heavy and anybody with intention to steal those items would require a longer time to complete the tasks and many men would be required to transport those items from the site and or a big lorry was needed to transport these items out of Pasar Keramat. Therefore, it was impossible for anybody, especially the employees of the defendant, not to notice any abnormalities or detect the thefts. (para 32)

(3) There was material contradiction as to the actual date the loss was discovered by the plaintiff. Further, if the alleged theft and/or missing fittings discovered by the plaintiff was massive loss to the plaintiff, the plaintiff would have reacted by filing the report immediately after being notified of the alleged theft and or missing fittings. (para 33)

(4) The plaintiff had not discharged the onus of establishing its pleaded case against the defendant on the balance of probabilities. On the other hand, the defendant had failed to establish a case against the plaintiff in respect of the defendant's counterclaim which related to the issue of wrongful termination of the agreement on the standard required by the law to justify a judgment to be made in favour of the defendant. (paras 4 & 36)

Legislation referred to:
Evidence Act 1950, ss. 62, 63, 65(1)(c)

For the plaintiff - Ahmad Amir Mahmood; M/s Affendi Zahari
For the defendant - Mohd Najib Omar; M/s Najib Omar & Co

Reported by Kok Fie See

JUDGMENT

Asmabi Mohamad JC:

Background Facts

[1] The plaintiff had appointed the defendant, a security company to provide security services at the plaintiff's site known as "Tapak Projek, Kompleks Pasar, Jalan Datuk Keramat, Kuala Lumpur" (hereinafter referred to as "Pasar Keramat") for a period of three years with effect from 1 September 2006 to 31 August 2009. In its writ and statement of claim ("SOC") the plaintiff claimed that the defendant had failed to provide the security services at Pasar Keramat which had resulted in the loss of all fittings worth RM5,251,008,50.

[2] In its defence the defendant denied liability and claimed that in fact it was the plaintiff which had breached the contract entered into between parties as the plaintiff had unlawfully and unreasonably terminated the defendant's services at Pasar Keramat. The defendant claimed damages for loss suffered by the defendant occasioned by the alleged wrongful termination of the agreement by the plaintiff.

[3] At the outset of the trial both learned counsels for the plaintiff and defendant had sought this court's permission for the proceedings to be limited only to the issue of liability and for damages to be assessed by the learned Deputy Registrar and or the Senior Assistant Registrar at a subsequent date should judgment be entered in favour of the plaintiff in the substantive claim and or in favour of the defendant in respect of the counterclaim. In view of the claim involved I had acceded to the request for the proceeding to be limited to the issue of liability only.

[4] The trial was fixed for hearing before me on 9 and 10 August 2012 and 27 September 2012 respectively with three witnesses having testified for each side. At the end of the proceeding, both parties had agreed to submit written submissions for this court's perusal and final decision. After giving full consideration to the evidence, both documentary as well as testimonial, and the submissions by all learned counsels for the respective parties I found that the plaintiff had failed to prove its claim against the defendant on the balance of probabilities. Hence I dismissed the plaintiff's claim against the defendant with costs. I had also dismissed the defendant's counterclaim with costs for the same reason. As regards the issue of costs, I had ordered each party to the proceedings to bear its own costs.

[5] The plaintiff being dissatisfied with the said decisions appealed to the Court of Appeal Malaysia against the whole of the said decision.

The Documents

[6] The relevant documents referred to in the course of this trial were as follows:

Documents	Marked
(i) Pleadings	Document "A"
(ii) Common Bundle of Documents (Vol. 1)	Document "B1"
(iii) Common Bundle of Documents (Vol. 2)	Document "B2"
(iv) Issues To Be Tried	Document "C"
(v) Statement of Agreed Facts	Document "D"

Case For The Plaintiff

[7] The plaintiff had called the Deputy Director of the Project Implementation, Enforcement and Building Maintenance Department of the Dewan Bandaraya Kuala Lumpur one, Hanum Ain binti Zainal ("PW1") as its main witness. PW1 testified that the facts surrounding the appointment and termination of the

A defendant under the Security Services agreement dated 13 November 2006 (hereinafter referred to as the "agreement") (see pp. 3 to 44 of document marked as "B1") were within her personal knowledge as she was the officer in DBKL entrusted with the tasks to supervise the said project. According to PW1
B the defendant took over the responsibility to provide security services at Pasar Keramat from another security company known as North Borneo Security on 1 September 2006. The process of handing over of Pasar Keramat to the defendant was done by surrendering the keys of the site to the defendant. However, there
C was no inventory of lists of things found at the site was prepared for that purpose.

[8] Prior to the tendering exercise, to be exact, on 27 September 2006, all prospective tenderers were invited by the
D plaintiff to view the site to enable them to assess the actual status of Pasar Keramat before tendering for the project. The list of prospective tenderers present during the site visit could be seen at p. 341 of document marked as "B2". PW1 was also present to brief all prospective tenderers of the status of the site. This site
E visit was scheduled about 26 days after the appointment of the defendant pursuant to the agreement. At the time the possession of site was given to the defendant all the fittings attached to Pasar Keramat were still intact and in good order (see pp. 311-325 of document marked as "B2").

F **[9]** On 25 April 2007 when PW1 and six officers from her department went to Pasar Keramat along with four consultants and six officers from the audit department, PW1 discovered that most fittings attached to the premises were missing. PW1
G suspected that these fittings could be stolen and or vandalised by some unscrupulous persons resulting in substantial loss which was estimated at RM5 million. A police report was lodged at the Hulu Kelang Police Station (see pp. 60 & 61 of document marked as "B1").

H **[10]** The plaintiff then instructed Messrs RKBA Partnership to prepare a report of the actual situation at Pasar Keramat as well as fittings which were stolen and or vandalised (see pp. 344-388 of document marked as "B2" (exh. ID7)).

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[11] PW1 testified that the last time she visited Pasar Keramat was on 27 September 2006 and the situation was as shown at pp. 311-325 of document marked as "B2". These photographs were taken by Messrs RKBA Partnership.

[12] The plaintiff had received a letter dated 7 September 2006 from the defendant on 18 April 2007 (see pp. 48-56 of document marked as "B1") and annexed to this letter were photographs taken on 3 September 2006 showing the damaged and stolen items at Pasar Keramat. PW1 disputed the contents of the letter and reiterated that as at 7 September 2006 those fittings were intact and in good order. Further PW1 denied having received any report of the alleged damage or vandalism as claimed by the defendant.

[13] The plaintiff had *vide* a letter dated 15 May 2007 caused a notice to be sent to the defendant informing the defendant of the damage to the premises and demanded the payment of RM3,474,304.05 from the defendant to be paid within 14 days from the date of the notice (see pp. 62-64 of document "B1"). On 9 July 2007 the plaintiff terminated the agreement (see pp. 68-69 of document marked as "B1").

[14] On 25 November 1997, one Abu Bakar bin Md Ali ("PW2") was appointed as the architect for Pasar Keramat. Amongst his scope of work was to design, supervise the documentation as well as supervision of the project until its completion. PW2 testified that as at 1 September 2006 most parts of Pasar Keramat had been completed with most electrical items and equipments having been fixed without finishes.

[15] PW2 further stated that he had taken the photographs as at 30 March 2006 (see pp. 312-325 of document marked as "B2" (exh. P6)). The purpose of taking these photographs before a new contractor was appointed was to record the actual physical status at site before the next tender exercise was being conducted. PW2 did not join PW1 for the site visit dated 27 September 2006 as he was admitted in the hospital for his heart ailment. His staff one, Yusof bin Surit attended the site visit on his behalf.

[16] According to PW2 as at 1 September 2006 the main building of Pasar Keramat was completed except for the paintwork. The escalators were also installed and in working condition. Most stalls were fixed with roller shutters, windows and

frames were fixed as well as installation of electrical wiring. The floor finishing, fittings, lightings and sign boards had yet to be fixed. PW2 confirmed that the photographs as shown at pp. 327-340 (ID-10) of document marked as "B2" were not taken by him.

[17] After the discovery of the theft of the fittings by the plaintiff, PW2 was requested by the plaintiff to prepare a report on the current status of Pasar Keramat to ascertain the damage to the fitting and the loss suffered by the plaintiff. Hence a report was prepared by PW2 on 8 May 2007 (see pp. 344-388 of document marked as "B2"). PW2 had also admitted that between March 2006 to 8 May 2007 he had not visited Pasar Keramat. The photographs at pp. 311-325 (exh. P6) of document marked as "B2" were also taken by PW2 for the purpose of his report.

[18] The plaintiff's third witness one, Roslan bin Zainal ("PW3") confirmed that he visited the site on 27 September 2006 with a view to have a close look at Pasar Keramat before he tendered for the contract to complete the works at Pasar Keramat. During the visit all seemed to be in good order with the electrical wiring, escalators and all fittings installed (see p. 341 of document marked as "B2"). PW3 managed to secure the tender to complete the works left by the previous contractor. At the time he revisited the site on 21 March 2007 to take possession of site he was surprised to find out that all fittings at Pasar Keramat including the escalators were no longer there. PW3 then reported the matter to the plaintiff. All fittings had been replaced by PW3 in order to enable Pasar Keramat to be functional.

[19] *Vide* its SOC the plaintiff claimed from the defendant the sum of RM5,251,008.50, cost and interest.

Case For The Defendant

[20] The defendant's first witness one, Nor Aida binti Ab Manaf ("DW1"), the Executive Director of the defendant confirmed the defendant's appointment to provide security services at Pasar Keramat (see pp. 5, 6 and 7 of the document marked "B1"). At the time the defendant took over possession of site for the purpose of the agreement, the defendant was not given a list of inventory of all things found at the site. Only the keys to Pasar

Keramat were given. PW1 testified that Pasar Keramat was an abandoned project and had been so for more than five years where most of the electrical cables were cut off and stolen, iron rod and steel were found scattered all over the place, the machineries that were found at the premises, including the escalators, had been pried out and or dismantled, the body of the lifts were missing and the quarters for the workers had been turned into a drug den. The defendant had notified the plaintiff of the state of affairs of the premises they were asked to guard *vide* a letter dated 7 September 2006 (exh. D11 see pp. 48 & 49 of document marked as "B1").

[21] On 3 September 2006 PW1 had gone back to Pasar Keramat to take some photographs of Pasar Keramat (see pp. 50 to 56 of document marked as document "B1"). These photographs were given to the general manager of the defendant one Shamsuri bin Ismail who is currently suffering from paralysis.

[22] There was no incident of any major break out except for one incident of trespass which occurred on 31 January 2007 for which a police report was lodged (see exh. D13 at pp. 59 to 61 of document marked as "B1"). From the time the defendant took possession of the site until 30 May 2007 there was no DBKL patrol car that turned up at Pasar Keramat to check on the defendant.

[23] At the time the defendant took possession of the site, Pasar Keramat was an abandoned project with things scattered everywhere and the condition was as if it had been neglected for a long time.

[24] Mohamad Sallehuddin bin Mori ("DW3") who was the defendant's Managing Director testified that he had caused a letter to be sent to the plaintiff (see pp. 65 & 66 of document marked as "B1") in response to the plaintiff's letter dated 17 May 2007 refuting all allegations contained in the plaintiff's letter dated 17 May 2006.

[25] Mohamad Edzuan bin Hj Supario ("DW2"), who was the Branch Manager of the defendant from 21 May 2006 to 21 May 2010 testified that on the first day he reported for duty with the defendant at Pasar Keramat a few men approached him and informed him orally that the agreement had been terminated. As

there was nothing in black and white pertaining to the termination DW3 and his men continued to provide the services at the premises. It was only on 7 July 2007 that the formal termination was served on the defendant.

Points Raised In The Submissions

By the plaintiff

[26] Amongst the salient points raised by learned counsel for the plaintiff were as follows:

(i) The plaintiff relied on the evidence of PW1 who was present during the site visit on 27 September 2006 which was arranged by the plaintiff to enable all potential tenderers to be appointed by the plaintiff to complete the works at Pasar Keramat to gauge the actual physical condition at site. During this visit PW1 found all things and fittings in place. PW1's evidence was supported by PW3 one of the successful tenderers who bidded at the tender exercise who had also confirmed that the fittings were intact during the site visit. On 21 March 2007 when PW3 went back to the site to take possession of the site and to commence work, he found the fittings were missing. PW3 instantly notified the plaintiff of his discovery. This evidence was not challenged by the defendant.

(ii) PW2 had testified that he had gone to Pasar Keramat on 30 March 2006 and taken some photographs which reflected the stage of works which were completed by the original contractor at the time he visited Pasar Keramat (at pp. 311 to 325 of document marked as "B2" ("exh. P6")). PW2's staff one Yusof Sarit who represented PW2 at the site did not report to him of any missing or damaged items. PW2 had also confirmed that the main building had been completed except for the finishes with most internal electrical and mechanical components had been installed including wiring works. Even the lifts and escalators were fixed. PW2 had also admitted it was quite a raw finish. At the request of the plaintiff, PW2 had also prepared a report as well taken photographs of Pasar Keramat (photographs were marked as ID-7 see pp. 344-388 document marked as "B2").

(iii) As regards ID-7, learned counsel submitted that these photos can be admitted as the prerequisite conditions under s. 65(1)(c) of the Evidence Act 1950 (Act 56) ("act") had been satisfied and reasonable explanation had been given by the plaintiff. The provisions of ss. 62 and 63 of the act also allowed for these photographs to be admitted as evidence.

(iv) The plaintiff had also questioned the time of delivery of exh. D11 and claimed that it was prepared and delivered after the event. Despite the fact that it was dated 7 September 2006 it was actually delivered to the plaintiff on 18 April 2007. Exhibit D11 was signed by one Samsuri bin Ismail who was not called as a witness. No evidence was adduced to show that Samsuri bin Ismail has resigned or is currently paralysed and or that he was an incompetent witness.

(v) The evidence of DW1 and DW2 was tainted with hearsay evidence. Therefore, their evidence is inadmissible and ought to be rejected by this court.

For The Defendant

[27] The learned Counsels for the defendant raised the following arguments:

(i) There was no evidence adduced by the plaintiff to show the actual state of Pasar Keramat at the time possession of the site was given to the defendant to commence the security services under the agreement. The plaintiff said that the defendant had taken over the security services from North Borneo Security but had failed to show when North Borneo Security commenced work and or when its services ended. Neither could PW1 explain if security services were provided from the time Pasar Keramat was left abandoned until the time the defendant was appointed.

(ii) PW1 had also testified that Pasar Keramat was an abandoned project since the year 2001 or 2002 but she was not able to show if security services were provided for the whole duration the project was left abandoned. PW1 who had testified that she had personal knowledge of the project was not able to explain to the court when the services of the main contractor for Pasar Keramat were terminated.

(iii) PW1 admitted the plaintiff was not able to show or prove if there were security services provided at the site from March 2006 until the time plaintiff took over the tasks on 1 September 2006.

(iv) There were also no photographs to show the actual condition of Pasar Keramat before and after the plaintiff was appointed. The photographs were inadmissible as the proof of this piece of evidence did not meet with the requirement of the act. There was also no proof that these photographs were taken on 30 March 2006. PW1 had also confirmed the photographs as at pp. 311 to 325 did not show that the same spots and locations were photographed. As such these photographs could not be the guide or reference to enable the court to ascertain the actual condition at site before and after agreement was executed.

(v) As regards PW2, the learned counsel submitted that PW2 would not be in a position to explain to this court the status of Pasar Keramat as at 27 September 2006 when the site visit was arranged by the plaintiff for potential tenderers as he was not physically present. Instead he was represented by one Yusof bin Surit who was not called as a witness. PW2's evidence as regards the actual condition on site as at 27 September 2006 ought to be rejected as it was hearsay evidence.

(vi) The evidence of PW2 pertaining to the photographs ought not taken into consideration as the photographs were taken five months before the defendant commenced work at Pasar Keramat.

(vii) PW2 had also admitted that he did not take the photographs as shown at pp. 327 to 340 of document marked as "B2". Neither did he visit the site from 30 March 2006 to 8 May 2007. PW2 had also not visited the site from the time the contract of the main contractor was terminated. Therefore the evidence of PW2 ought to be rejected by this court.

(viii) There was contradictory evidence as regards the actual date the fittings were found missing and or vandalised. PW1 testified that it was on 25 April 2006 but PW3 testified that it was on 21 March 2007.

Evaluation And Findings

[28] PW1 was the main witness for the plaintiff. Despite having testified that she was personally involved with the facts and circumstances surrounding Pasar Keramat, PW1 had very minimal knowledge about Pasar Keramat. This was evidenced in the manner PW1 answered the questions posed to her in cross-examination. PW1 was not able to provide facts pertaining to the project. It appeared to me PW1 came to the court unprepared, with very bare knowledge about the whole project and or not remembering important facts pertaining to Pasar Keramat. PW1 was not even able to tell the court when the main contractor for the project was terminated and whether security services were provided after the previous security company North Borneo Security was terminated. PW1 too was not able to show the court whether Pasar Keramat was properly guarded during the times it was left abandoned for more than five years until the time the defendant was appointed by the plaintiff to provide security services.

[29] PW1 admitted that Pasar Keramat had been an abandoned project for more than five years yet there was no document produced by the plaintiff who was making a claim well above five million to show to the court the actual condition at site at the time of handing over of Pasar Keramat to the defendant. There was no proper inventory prepared by the plaintiff to show to the court that Pasar Keramat which had been abandoned for more than five years was still intact and in good order despite the intervening years. PW1 agreed with the suggestion by the learned counsel for the defendant that the services of the main contractor was terminated around March 2006 and was not able to provide proof if any company was engaged to provide security services to Pasar Keramat from March 2006 up to the time the defendant was appointed under the agreement.

[30] The plaintiff's attempt to make a comparison between the conditions at site pre-agreement and post-agreement as at pp. 311 to 325 and 327 to 340 of document marked as "B2" could not be accepted by the court as the photographs did not correspond. Pages 311 to 325 of document marked as "B2" contained 126 photographs but at pp. 327 to 340 there were only 56 photographs. The spots and the locations of the photographs at

pp. 311 to 325 and 327 to 340 did not correspond to prove the pre-agreement and the post-agreement position. This was admitted by PW1 during cross examination. PW1 had also admitted some of the pre-agreement photographs too showed that at some spots and or locations the fittings were already damaged. The photograph showed that the door was damaged (see p. 315 photograph no. 3), the roller shutters were dismantled and or missing and or stolen (at p. 313 photograph no. 6 & 7, at p. 315 photograph no. 8, at p. 318, at p. 324, at p. 328), the floors were broken and scattered all over (at p. 316), the structure outside the building was missing (see at p. 317 photograph no. 6) guard railing had not been fixed (see at p. 317), the railing to the staircase missing (at p. 319 photograph no. 3, 6 & 8), the windows were missing and or had not yet been fixed (see at p. 322 photograph no. 1 & 4, no. 2 & 9 and p. 323).

[31] As the place was huge, it was just impossible for PW1 and or PW3 or anyone for that matter to remember every detail as to whether the actual condition at Pasar Keramat at the time it was left by the main contractor was still the same as at 1 September 2006, the time the defendant commenced work at Pasar Keramat. As the photographs could not provide any guidance and PW1's state of remembering facts were questionable, this court would require documentary proof other than the oral testimony of PW1 and/or PW3. The invitation to tender by the plaintiff, the letter of award to PW3 and the contract document executed between PW3 and the plaintiff, if produced, would shed some light to the extent of damage to Pasar Keramat which needed to be rectified. The new tender document, the letter of award and or contract entered into between PW3 and the plaintiff to complete Pasar Keramat which was available could be helpful to show the actual work that needed to be done at Pasar Keramat by the new contractor. If the building had been completed with all fittings both mechanical and electrical had been fixed and leaving only the finishing to be done as claimed by PW2 why would the plaintiff pay another RM26 million to PW3 and or RM32 million (including the variation order) for PW3 to complete the tasks. PW3 too was not able to tell the court what was his scope of work at Pasar Keramat but merely stated that he was in charge of building and the rest of the works were done by specialist sub-contractors nominated by the plaintiff under his supervision.

[32] PW1 had also admitted in cross examination that the fittings that were missing were bulky and heavy and anybody with intention to steal these items would require a longer time to complete the tasks. Further as these items were huge and bulky many men would be required to transport these items from the site and or a big lorry was needed to transport these items out of Pasar Keramat. Therefore it was just impossible for anybody, especially the employees of the defendant, not to notice any abnormalities or detect the thefts. There was in evidence that four of the defendant's guards were detained by the police. However they were released and none of them was charged in court and or convicted by the court for a criminal offence. This also had ruled out the possibility of the defendant's employees were involved with any criminal act.

[33] Another glaring contradiction was the date of the alleged theft and or missing fittings were discovered by the plaintiff. According to PW1 she discovered this on 27 April 2007 but PW3 testified that it was on 21 March 2007. If it was true that there was massive loss to the plaintiff as claimed by PW1, surely PW1 would have reacted by filing the report immediately after being notified by PW3 on 21 March 2007. As to the reason PW1 waited for a month to lodge a report concerning a massive loss to the plaintiff was also questionable. There was material contradiction as to the actual date the loss was discovered by the plaintiff. PW1 disagreed that it was PW3 who had informed the plaintiff of the incidents of missing fittings and or the theft. PW3 could not remember to whom the report was made.

[34] As regards the evidence of PW2, this court is satisfied that based on his testimony in court PW2 had no personal knowledge of the condition of Pasar Keramat as at 27 September 2006 because on the day in question he was admitted in the hospital for his heart condition. His company was represented by one Yusof bin Sarit who was not called by the plaintiff as its witness. Therefore what was said by PW2 was merely hearsay evidence and was rejected by this court. Further PW2 could only rely on the photographs taken on 30 March 2006, which was some five months before the defendant entered into agreement with the plaintiff. PW2 had not visited the site after that date and would not be in a position to explain to the court if any security services

were provided. PW2 too being so acquainted with the project having been involved as an architect for the project since day one was not able to explain to the court things that were missing and their value.

[35] As regards the status of the photographs at pp. 344-388 of document marked as "B2" the plaintiff had not discharged the burden required by the law to render these photographs as admissible evidence in court. The source of their photographs were unknown. Even PW2 admitted that he did not take those photographs. PW2 admitted that he had not seen those photographs before and even the format of the photographs were not the same as his firm's format. Since the source of the photographs were unknown these photographs could not be admitted as evidence in court as secondary evidence pursuant to s. 65(1)(c) of the Act.

The Counterclaim

[36] As the defendant had not appealed against the dismissal of the counterclaim I would not delve into this issue. Suffice for me to state that on the totality of the evidence before me the defendant's three witnesses had failed to establish a case against the plaintiff in respect of the defendant's counterclaim which relate to the issue of wrongful termination of the agreement on the standard required by the law to justify a judgment to be made in favour of the defendant. Hence the defendant's counterclaim was also dismissed with cost.

Conclusion

[37] On the totality of the evidence adduced by the plaintiff through its witness both testimonial and documentary and having evaluated the evidence of the defendant I am satisfied the plaintiff had not discharged the onus of establishing its pleaded case against the defendant on the balance of probabilities. Hence the plaintiff claim was dismissed. In regards to the defendant's counterclaim based on the reasons mentioned herein I am satisfied that the defendant had failed to prove its case on the standard required by the law and the defendant's claim is also dismissed. In view of these findings I had also made an order for each party to bear its own costs.

[38] In arriving at the above decisions I had carefully considered the evidence adduced by the plaintiff and the defendant both testimonial as well as documentary, the submissions by the plaintiff as well as the defendant and the authorities tendered in support of their respective submissions.

[39] I would like to express my sincere appreciation to both learned counsels who had diligently and professionally conducted the trial before me and assisted me with their submission to enable me to dispose this case.